that delay. (¶ 218) GTE endorses reliance on current industry practices in this regard and urges the Commission not to promulgate national standards at this time.

Importantly, however, any "standards" for "dialing delay" that might ultimately be adopted must separately address those elements of a transmission that are within the control of each participating service provider. Otherwise, enforcing a reasonable delay requirement where, as is likely to be the case, multiple parties are jointly involved in providing a given service would be virtually impossible. Although such a formulation may require the FCC to define "delays" for each of several components of a service offering, it is the only way to assign blame for unreasonable delays in a fair and productive manner.

The Commission should, at a minimum, wait until after the provisions of the 1996 Act are implemented and the new network systems have stabilized to determine what constitutes a reasonable dialing delay. Number portability, dialing parity and other newly required actions will undoubtedly affect network performance, including dialing delay, at least during a transition period. Any current determination of an unreasonable delay will be based on network designs that will bear little resemblance to the network structures of tomorrow.

For example, it has been suggested that the two mechanisms now under consideration for achieving service provider number portability, AT&T's Location

Routing Number ("LRN") and Pacific Bell's Query on Release ("QOR"), may have different impacts on dialing delays. Not only would it be ill-advised for the FCC to adopt either approach until the completion of technical trials,[19] it would be similarly unreasonable to establish delay parameters that either are predicated on such a premature decision or would later constrain the Commission's discretion in identifying (or allowing carriers to choose) the optimal number portability mechanism. Accordingly, in view of the tremendous changes destined to occur under the 1996 Act, it is much too early to set standards for dialing delay.

Cost Recovery. The 1996 Act does not specify a cost recovery mechanism for providing dialing parity to competing providers. The Commission asks what, if any, standard should be used for arbitration to determine the dialing parity implementation costs that LECs should be permitted to recover. It further seeks comment on how those costs should be recovered. (¶ 219)

The recovery of all dialing parity costs must be ensured whether for implementation or ongoing activities. However, there is no need for FCC intervention for this to happen. The states are addressing this issue in the course of their ongoing proceedings noted above. In addressing this issue at the state level, GTE has proposed to recover software, systems, customer and

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[19] *See* Telephone Number Portability, Comments of GTE, CC Docket No. 95-116 (filed March 29, 1996).

miscellaneous costs from those parties participating in intraLATA equal access through tariffs over a three-year period.

IV. THE COMMISSION NEED NOT PRESCRIBE DETAILED NEW RULES TO GOVERN ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY BEYOND THOSE NEEDED TO FORMULATE APPLICABLE RATES (¶¶ 221-225)

Section 224(b)(1) has always given the Commission jurisdiction over the "rates, terms and conditions for pole attachments."[20] Nonetheless, the Commission's role has largely been limited to establishing the formula for determining the "just and reasonable" rates required for such pole attachments,[21] which formula is only applicable in states that have not chosen to regulate such pricing. Remaining terms and conditions for pole attachments have been left to the parties to negotiate.[22] Now, in the face of new legislation that is intended to result in less regulation of the telecommunications industry and that does not alter the pre-existing option for state primacy if asserted, the Commission appears ready to prescribe a number of detailed rules where it has never done so before.

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[20] 47 U.S.C.A. § 224(b)(1) (1991 & Supp. 1995).

[21] *See, e.g.,* 47 C.F.R. § 1.1404.

[22] *See* 47 C.F.R. § 1.1404(d).

The general principles added to section 224 by the 1996 Act (*e.g.*, §§ 224(f), (g), (h), and (i)) do not require the Commission to promulgate new detailed rules to govern access to poles, ducts, conduits, and rights-of-way. Rather these general principles can be used more effectively as essential guidelines for the parties in the negotiating process. Indeed, the only express requirement for Commission rulemaking is found in section 224(e) in relation to the establishment of new regulations to govern the charges to telecommunications carriers (and CATV companies providing telecommunications services). Beyond rates, the Commission should limit its involvement to clarifying any general principles that are ambiguous while allowing the parties to continue to negotiate the specific terms and conditions for access.[23]

In the almost twenty years that section 224 has been in place, owners have commendably demonstrated their ability to negotiate "just and reasonable" terms and conditions for access. Experience has shown that the disputes that make their way to the Commission usually focus on proposed increases to the rates charged for access, not on the general terms and conditions for access. GTE firmly

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[23] Practical reasons also militate against heavy-handed new rules. GTE already has received a number of requests for access and anticipates that new agreements will be reached well before the Commission issues rules in this proceeding. Consequently, GTE would like to avoid having to renegotiate or substantially amend all of these agreements to conform to subsequently released rules.

believes that specific regulations for access beyond those required for rates will only result in counterproductive disputes over their interpretation as parties attempt to apply them to situations not anticipated in the rulemaking process.

Nondiscriminatory Access. The FCC seeks comment regarding the meaning of "nondiscriminatory access" as used in section 224(f)(1). (¶ 222) The Commission should clarify that nondiscriminatory access requires the owners of facilities to apply the same "just and reasonable" rates, terms and conditions to all third parties obtaining access. Owners should not be allowed to discriminate in favor of affiliates, partners or joint ventures with, for example, lower rates or less stringent safety requirements. There is nothing in the 1996 Act, however, to support the Commission's suggestion that "nondiscriminatory" access might require that the same terms and conditions be applied to everyone, including the owner of the property.[24] Relegating the property rights of owners to the status of non-owning attaching parties, while requiring owners to bear a disproportionate share of maintenance costs and other ownership obligations as the 1996 Act does,

[24] In fact, provisions of the 1996 Act suggest just the opposite. For example, section 224(e)(2) requires a utility to apportion the costs of providing "other than the usable space" on poles to attaching entities, but only to the extent of two-thirds of the costs that otherwise would be allocated under an equal apportionment of such costs among all attaching entities. This formula clearly leaves the remaining one-third of these costs to the owner, a result not possible if the owner were required to be treated exactly the same as all attaching parties.

would raise a serious constitutional issue. The physical "taking" of GTE's property in this manner without just compensation would constitute a violation of the Takings Clause.[25]

Denial of Access. Section 224(f)(2) allows "a utility providing electric service" to deny access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[26] Although GTE does not dispute that an electric utility may be faced with situations requiring a denial of access, it defies logic to limit the right to deny access in such situations to electric companies only. If, for example, a hazard would be created by allowing an additional party on a pole, the ability to deny access should not turn on whether or not the owner of the pole provides electric service.[27] Because a facility owner should not be unwillingly exposed to potential liability for permitting the creation of

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[25] For a more complete discussion of how the FCC's proposals constitute violations of the Takings Clause, see the related Comments of GTE filed in this proceeding on May 16, 1996 at 66-68.

[26] § 224(f)(2).

[27] For example, city and state highway departments require a minimum clearance for cables crossing roadways. This clearance is measured in the center of the road, meaning that the attachment height at the pole must be considerably higher to allow for the mid-span sag. If the proposed pole attachment cannot provide the necessary height, and replacing the pole with one that could provide the height is not feasible, an incumbent LEC should be allowed to deny access.

a hazard, the denial of access in such circumstances should be recognized as a reasonable discrimination.

The Commission seeks comment on "specific reasons of safety, reliability, and engineering purposes, if any," that would constitute a valid basis for denial of access. (¶ 222) GTE would caution the Commission that it simply is not possible to anticipate and specify every conceivable reason of safety, every conceivable reason of reliability or every possible engineering purpose that would justify a denial of access. Consequently, any rule purporting to limit the universe of legitimate safety, reliability or engineering reasons may, under a given set of facts, conflict with applicable standards established by other agencies or regulatory bodies.[28] For example, in addition to state and local rules, the facilities at issue here are currently governed by rules of the American National Standards Institute, the Institute of Electrical and Electronic Engineers and the Occupational Safety and Health Act. Applicable industry standards are also found in the National Electric Code and the National Electrical Safety Code. Indeed, the very existence of these standards, developed by bodies with special expertise, further demonstrates that

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[28] Thus, Commission regulations specifying a "minimum or quantifiable threat to reliability" before access can be denied could result in a situation in which access is required because this threshold is deemed not to have been met even though the attachment may violate a state or local safety ordinance, an industry standard or even a non-FCC federal regulation.

additional Commission rules are unnecessary and that the legitimacy of denials under section 224(f)(2) must be evaluated on a case-by-case basis.

The Commission also asks whether it should establish regulations to ensure that a utility "fairly and reasonably allocates capacity." (¶ 223) GTE is concerned that any more detailed requirements than a general recognition of the "fairness" of accommodating users on a first-come-first-served basis will be impossible to apply in what can be expected to be widely varying circumstances.[29] The Commission must recognize that, at some point, the space available on poles or in conduits will exhaust. At that point, new providers will be in the same situation LECs and electric utilities have always been in -- they will have to build their own facilities. Nothing in the 1996 Act creates any obligation on LECs or electric utilities to subsidize new entrants by perpetually building new facilities for them to place their equipment.

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[29] For example, if the challenging party requires a particularly small amount of space and that space could have been available if other attachments had been placed in a slightly different configuration, will the pole owner be deemed to have not "fairly and reasonably" allocated space to the first three, four or five attaching parties? In allocating space to attaching parties, would the pole owner be required to plan for a specific number of possible attaching parties in order to be "fair" in allocating space? If so, should allocated space then be limited for each attaching party in anticipation of a specific number of attaching parties ultimately requesting space? These are just some of the complex questions that will arise should the Commission attempt to legislate "fairness" and "reasonableness" in standardized rules.

Notice by Owner of Alterations or Modifications to Facilities. For similar reasons, the Commission should not establish detailed notice requirements under section 224(h). (*See* ¶ 225) Currently, the time frames established by owners for the modification or alteration of poles can range from several weeks to a few days from the time a decision is made to do the work.[30] Any rule that sets an arbitrary notice requirement will unfairly (and in many cases, unnecessarily) prevent owners from doing any work until that time has expired, whether or not the job could have been completed earlier.

In addition, all parties may not want notice of every planned modification or alteration. Parties may, for example, only want notice if more than a given number of poles will be affected. Some may desire no notice at all until a later date (*e.g.,* newly attaching parties). Others may only want notice if a particular type of job is to be undertaken (*e.g.,* replacement of poles rather than mere reinforcement).

Notice requirements would also raise troubling issues of potential liability should the owner later change its plans. Any rules adopted could not possibly address the myriad of scenarios. Parties should be permitted to negotiate their respective rights and obligations regarding such matters. The resolution of such

[30] In cases of emergency, the work literally may be commenced within hours of making the decision.

issues is part of the general risk assignment process that is integral to all contracts and should be left to the parties.

In short, with the 1996 Act having created the obligation to provide notice, it would be more efficient to leave it to the parties to agree on when and what kind of notice will be given. A decision by the parties that only certain types of notice are necessary should not require a formal waiver of Commission rules.

Apportioning Costs for Alterations or Modifications. The Commission should not attempt to develop formulas for apportioning costs if an attaching party chooses to modify or alter its attachment along with the owner. (*See* ¶ 225) The varying factual scenarios are too numerous for clear and workable rules to be developed.[31] Now that owners are required to provide access to their facilities, the incentive for each party to share (and avoid unnecessary) costs whenever possible will only be heightened, thus encouraging negotiated arrangements.

Finally, the Commission should not impose arbitrary limitations on an owner's right to modify a facility when necessary. Although GTE agrees that owners should not be making unduly burdensome or unnecessary modifications to

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[31] For example, a rule apportioning costs may be appropriate when work is to be done jointly on a pole but may not be equitable when the work is to be done on subterranean conduit. Unlike the relative ease of working on most poles, work on conduits is generally more expensive because it requires more planning and greater lead time in order to obtain necessary permits from local authorities, as well as other formal clearances.

their poles, it does not believe that a single rule can be devised for purposes of determining in every possible situation whether a given modification is or is not "necessary."[32] If called upon, the Commission should evaluate challenges to such modifications on a case-by-case basis.

V. THE COMMISSION SHOULD MOVE EXPEDITIOUSLY TO FULFILL PREVIOUSLY-ESTABLISHED DIRECTIVES RELATED TO NUMBER ADMINISTRATION (¶¶ 250-259)

Section 251(e)(1) of the 1996 Act requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis."[33] The Commission tentatively concludes that its *NANP Order*[34] satisfies the requirements of this section of the 1996 Act. In the *NANP Order*, the Commission determined that the functions of the NANP administrator should be transferred to a new administrator not affiliated with any particular industry segment.[35] GTE

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[32] Also, it is very unlikely that LEC owners will be inclined to waste time and money making unnecessary modifications, particularly when such resources increasingly will be needed to compete with new providers.

[33] § 251(e)(1).

[34] *NANP Order*, 11 FCC Rcd 2588.

[35] *Id.* at ¶¶ 57-59.

concurs in the FCC's tentative conclusion that implementation of the *NANP Order* would satisfy the requirement of section 251(e)(1). (*See* ¶ 252)

However, GTE understands that, for various reasons, the members of the NANC have not yet been named, a chairman has not yet been chosen and, consequently, there has been little progress made in choosing the new administrator. With the advent of number portability, new competition, and new services, numbering issues are becoming more complex, thereby increasing the likelihood of significant disputes. Therefore, it crucial that the Commission act swiftly to name the NANC Committee members and ensure that the NANC expeditiously fulfills its mandate under the *NANP Order* and the 1996 Act.

The Commission further proposes to delegate to Bellcore, the LECs, and the states the authority to continue performing each of their functions related to the administration of numbers until such functions are transferred to the new NANP administrator. (¶ 258) This approach is reasonable and administratively efficient. During the transition period, it is appropriate to maintain the *status quo* by having those parties with experience continue to perform the administrative functions that they have become uniquely equipped to handle.

Section 251(e)(2) of the 1996 Act provides that the "cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis

as determined by the Commission."[36] In the *NANP Order*, the Commission: (1) directed that the costs of the new impartial numbering administrator be recovered through contributions by all communications providers; (2) concluded that the gross revenues of each communications provider should be used to compute each provider's contribution to the new numbering administrator; and (3) ordered the NANC to address the details concerning recovery of the NANP administrator costs.[37] These actions fully satisfy the cost recovery requirement of the 1996 Act, if the Commission ensures that they are implemented in a manner that does not unduly favor or disadvantage any particular industry segment or technology. The FCC need not take any further action.

VI. CONCLUSION

For the foregoing reasons, GTE urges the Commission to refrain from establishing detailed, uniform federal mandates with respect to public notice of network technical changes, dialing parity, access to rights-of-ways, and number administration that go beyond existing requirements. Rather, the FCC should identify acceptable outcomes for implementation of these principles within reasonable ranges as described herein. This approach will best advance the 1996

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[36] § 251(e)(2).

[37] *NANP Order*, ¶¶ 94, 99.

Act's pro-competitive goals through reliance on individual negotiations subject to state review and FCC guidance.

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May 20, 1996

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I hereby certify that on this 20th day of May, 1996, I caused copies of the foregoing "Comments of GTE" to be hand-delivered to the following:

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